

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNION GOSPEL MISSION OF YAKIMA,) Case No. 1:23-cv-3027-MKD
WASHINGTON,)
) May 31, 2023
Plaintiff,)
) Richland, Washington
v.)
) Video Conference Motion
ROBERT FERGUSON, et al.,) Hearing
)
Defendants.) Pages 1 to 76

BEFORE THE HONORABLE MARY K. DIMKE
UNITED STATES DISTRICT COURT JUDGE

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1 (Call to Order of the Court)

2 THE COURTROOM DEPUTY: Matter before the Court is *Union*
3 *Gospel of Yakima v. Robert Ferguson, et al.*, 1:23-cv-3027-MKD.
4 Time set for a motion hearing.

09:05:42 5 Counsel, each time you address the Court, if you could
6 please state your name to assist the court reporter in making an
7 accurate record. And also, when you're not addressing the
8 Court, please ensure that your microphone is muted.

9 Counsel, please state your presence for the Court and
09:05:56 10 record, beginning with counsel for the plaintiff.

11 MR. TUCKER: Yes. Ryan Tucker and also have Jacob Reed
12 in the room with me on behalf of Union Gospel Mission and,
13 likewise -- on the Zoom call, David DeWolf is likewise counsel
14 for the plaintiff.

09:06:14 15 THE COURT: Good morning.

16 MR. TUCKER: Good morning.

17 MR. DeWOLF: Good morning.

18 MR. WARD: And, Your Honor, on behalf of Defendants, the
19 Attorney General Robert Ferguson, Andreta Armstrong, and the
09:06:25 20 Commissioners of the Washington State Human Rights Commission,
21 I'm appearing, David Ward.

22 THE COURT: Good morning.

23 MR. WARD: And I also have co-counsel who -- would you
24 like to make your introduction?

09:06:36 25 MR. JEON: Good morning, Your Honor. Daniel Jeon for

1 defendants as well.

2 THE COURT: Good morning.

3 All right, Counsel, today we're here for argument on two
4 separate motions. First, I would like to take argument on the
09:06:49 5 defendants' motion to dismiss. As part of your comments, I did
6 issue a text order last week asking the parties to be prepared
7 to discuss the issue of whether a stay would be appropriate
8 while the Ninth Circuit decides the Seattle Pacific University
9 matter. The way I see Judge Bryan's order is that he dismissed
09:07:09 10 on two grounds; one, the *Younger* abstention, which is not at
11 issue here; but second, on the issue of redressability, which I
12 do think is an issue here.

13 And so I would like the parties to comment on that,
14 including whether they believe that the framing of this
09:07:22 15 complaint, the relief requested is sufficiently different to --
16 as to whether a stay would be appropriate or not, considering
17 those issues.

18 After we take full argument on the motion to dismiss,
19 then we'll turn to the motion for a preliminary injunction,
09:07:39 20 unless -- had the parties anticipated or discussed any other
21 procedure for today? Mr. Tucker?

22 MR. TUCKER: No, Your Honor.

23 THE COURT: All right. Mr. Ward, does that process work
24 for you?

09:07:50 25 MR. WARD: Yes, Your Honor.

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1 THE COURT: All right. We'll begin with defendants'
2 motion to dismiss. It's defense's motion, so I'll hear from
3 Mr. Ward first.

4 MR. WARD: Thank you, Your Honor.

09:08:00 5 And before I start, do you have any time limit for the
6 motions?

7 THE COURT: That's a great question. I should have
8 started with that. I have the entire morning booked, and so you
9 have until noon. So please frame your comments with knowing I
09:08:17 10 can give you about an hour and a half on each motion.

11 MR. WARD: Thank you, Your Honor. I don't anticipate
12 we'll need that much, but it's nice to have that much time.

13 And, Your Honor, again, David Ward appearing for
14 defendants. I would like to reserve time for rebuttal. I
09:08:32 15 think, given the time period that you're allowing, ten minutes
16 probably for rebuttal. But I'd like to begin --

17 THE COURT: I am not -- I am not particularly
18 formalistic about the timing of motions. If something comes up
19 in the course of argument, I may hear from each of you two or
09:08:48 20 three times, so I don't have --

21 MR. WARD: Okay.

22 THE COURT: -- I don't have a strict argument, response,
23 rebuttable. We'll see how the argument develops.

24 MR. WARD: Okay. Thank you, Your Honor.

09:08:58 25 And to begin with the issue you asked us to be prepared

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1 to discuss, whether a stay would be appropriate in this case
2 until the Ninth Circuit issues its decision in the *Seattle*
3 *Pacific University v. Ferguson* case, defendants have not
4 requested a stay as part of their pleadings in this matter, and
09:09:16 5 we don't believe a stay is necessarily warranted in this case,
6 based on the issues that the Court has raised.

7 As the Court has recognized, there are some differences
8 between the *SPU* case and this case. In particular, that *Younger*
9 abstention was an issue that Judge Bryan relied upon in granting
09:09:41 10 the motion to dismiss in the *SPU* case.

11 The issue of redressability is up in both cases. It's
12 an active issue in both cases. But I don't believe there's
13 certainty that the Ninth Circuit decision will necessarily reach
14 that issue. There's not a lot of certainty that there will be a
09:10:04 15 simplification of the issues, depending on the Ninth Circuit's
16 decision.

17 And looking at the *Landis* factors for issuing a stay,
18 you know, a key question is whether the case could be
19 simplified, and I don't think we have that kind of certainty
09:10:19 20 here, although I would acknowledge it is a possibility.

21 So defendants are not advocating for a stay here. We do
22 recognize that the Court has the inherent authority to raise
23 this issue sua sponte, but we would not seek one on our own
24 initiative.

09:10:38 25 So getting to the merits of our motion to dismiss, this

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1 case was brought out of the blue, from defendants' perspective.
2 Defendants had not had any kind of contact with the Union Gospel
3 Mission of Yakima regarding their religious hiring practices
4 before we received the complaint in this matter. And defendants
09:11:06 5 have not taken or threatened any enforcement actions against the
6 organization.

7 Under these circumstances, UGM's highly unusual
8 complaint in this matter must be dismissed because it does not
9 present any judicable claims.

09:11:23 10 As a threshold matter, UGM lacks standing to bring the
11 claims in its complaint because it fails all three prongs that
12 must be satisfied in order to have standing. First, UGM has not
13 suffered any injury, in fact. Second, defendants have not
14 caused any of UGM's alleged injuries. And finally, none of
09:11:40 15 their alleged injuries -- I'm sorry -- their alleged injuries
16 are not redressable by this Court.

17 And it -- in addition to that, there is the ripeness
18 doctrine, and UGM's speculative claims here are just simply not
19 ripe for review.

09:11:55 20 So I'd like to begin with the standing issue. Standing
21 is obviously a threshold issue for the Court to decide, and it
22 goes to the Court's subject matter jurisdiction. And UGM has
23 the burden to demonstrate that it satisfies every element of
24 standing for every claim and every form of relief it sought. As
09:12:11 25 I mentioned before, the three elements of standing are familiar:

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1 injury in fact, causation, and redressability. And injury in
2 fact is what I'd like to start with.

3 An injury in fact has to be, obviously, concrete and
4 particularized, where enforcement is actual or imminent. It
09:12:29 5 can't be conjectural or hypothetical. And here, there is no
6 actual enforcement alleged against UGM of the statute or court
7 decision that they are complaining about, nor is enforcement
8 imminent on the part of defendants. UGM is simply speculating
9 that it could be the target of an action by defendants, such as
09:12:52 10 an investigation or an enforcement action under the Washington
11 Law Against Discrimination, at some point in the future. But it
12 does not allege that defendants have taken or threatened any
13 kind of action against them, and nor could they.

14 The only thing that UGM points to is a single letter
09:13:10 15 that the Attorney General's office sent to Seattle Pacific
16 University last year. That letter sought information about the
17 university's hiring practices after the university -- or
18 sorry -- after the Attorney General's office had received
19 hundreds of complaints from members of the public. The letter
09:13:27 20 requested information from Seattle Pacific University, but there
21 were absolutely no consequences to the university if it declined
22 to provide the information that was requested by the Attorney
23 General's office.

24 The letter that was sent specifically noted, as well,
09:13:42 25 that the Attorney General had not made any determination as to

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1 whether SPU had violated the law, and did not threaten any legal
2 action.

3 Seattle Pacific University did in that case decline to
4 provide the information that had been requested by the Attorney
09:13:56 5 General's office, and instead, they filed a lawsuit against the
6 Attorney General, which, as you know, Judge Bryan dismissed on
7 both redressability and *Younger* abstention grounds.

8 And here as well, UGM's complaint should be dismissed
9 for lack of standing.

09:14:11 10 THE COURT: Let me ask a couple of questions about the
11 *SPU* matter. Has the Attorney General's office or any of the
12 other entities involved in this action taken any further steps
13 with respect to the *SPU* matter beyond the letter that was at
14 issue in the litigation?

09:14:26 15 MR. WARD: No, Your Honor.

16 THE COURT: All right. No further action has been taken
17 since that matter was dismissed?

18 MR. WARD: No, Your Honor.

19 THE COURT: All right. And has --

09:14:37 20 MR. WARD: The --

21 THE COURT: -- the Attorney General's office or any of
22 the other entities at issue sent any type of similar letters to
23 other entities, based on the Supreme Court's interpretation in
24 *Woods*?

09:14:51 25 MR. WARD: No, Your Honor.

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1 THE COURT: All right. And, I'm sorry, you indicated
2 you might have been wanting to follow up or clarify on a
3 question I just asked when I started another one.

4 Was there something you wanted to add?

09:15:01

5 MR. WARD: No, Your Honor. I was just going to point
6 out that the briefing is ongoing in the *SPU v. Ferguson* case,
7 and our brief is due this -- the Attorney General's office's
8 brief is due this Friday in response to Seattle Pacific
9 University's opening brief.

09:15:21

10 THE COURT: All right. Thank you.

11 MR. WARD: Yes.

12 Now, when we look at injury in fact, the US Supreme
13 Court's decision in 2021 in *Whole Woman's Health v. Jackson* is
14 very instructive. The Court in that case emphasized that
15 there's no unqualified right to a pre-enforcement review of
16 constitutional claims in federal court. The Supreme Court noted
17 that in such cases pre-enforcement challenges are frequently
18 brought as defenses to state law claims, if there's an actual
19 case or controversy brought in state court.

09:15:59

20 The Court also emphasized that the mere chilling effect
21 of having a potentially unconstitutional law on the books is not
22 sufficient to confer an injury in fact. There must be proof of
23 a more concrete injury.

09:16:14

24 In order to maintain a pre-enforcement challenge before
25 the -- a government entity takes action against a party, there

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1 has to be a credible threat of prosecution. That's been
2 emphasized by the US Supreme Court in the *Driehaus* case. This
3 analysis includes three factors: whether the plaintiffs have
4 articulated a concrete plan to violate the law in question;
09:16:34 5 whether the prosecuting authorities have communicated a specific
6 warning or threat to initiate proceedings; and third, the
7 history of past prosecution or enforcement under the alleged
8 statute.

9 Now, on the first point, we don't have a lot of facts
09:16:51 10 here to determine whether the WLAD, the Washington Law Against
11 Discrimination, even would apply to the Union Gospel Mission's
12 employment practices. Defendants, as I mentioned before, did
13 not have any knowledge of UGM's hiring practices before this
14 complaint was filed. They were not under investigation. They
09:17:13 15 were not subject to any enforcement actions by defendants,
16 particularly with respect to their religious hiring practices.

17 UGM is maintaining in their complaint that they are
18 subject to the WLAD because they have non-ministerial as well as
19 ministerial employees. However, in the exhibits that are
09:17:38 20 attached to their complaint, which are part of the pleading
21 under Rule 10(c), UGM asserts a very different story. They
22 assert, in particular in Exhibit 4 to their complaint, that all
23 of their employees are, quote, what is called a minister, by law
24 and judicial decision. The job descriptions for the two
09:18:00 25 positions that they have put forward here as examples of where

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1 they are allegedly chilled in hiring, their IT technician and
2 operations assistant positions, similarly those job descriptions
3 indicate that the employees are expected to minister to Union
4 Gospel Mission's clients and others in the Mission.

09:18:25 5 So on the face, we have some conflicting information
6 from UGM itself about whether it employs ministerial or
7 non-ministerial employees. If they do actually only employ
8 ministerial employees, there's no question that the WLAD would
9 not apply to them, and any effort by the Court in this case to
09:18:47 10 decide matters would simply constitute an advisory opinion
11 because UGM would not be subject to the WLAD plainly under *Woods*
12 or under US Supreme Court precedent.

13 Now, on the second point, to whether there's a credible
14 threat of prosecution, whether the prosecuting authorities have
09:19:04 15 communicated a specific warning or threat to initiate
16 proceedings, as I mentioned before, there is zero evidence or
17 allegation that any of the defendants have communicated such a
18 specific warning or threat to initiate proceedings against UGM.
19 And there are cases where -- you know, cited in the parties'
09:19:26 20 briefs such as the *Yellen* case or *Bonta* case, where there were
21 such specific threats in the form of communications from the
22 government to the parties who were alleging injury, that the
23 law -- that they would -- that the law that was being challenged
24 was applicable to them.

09:19:45 25 No such communication has gone forward to Union Gospel

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09:20:04 1 Mission. Indeed, even in the *SPU* case, the letter from the
2 Attorney General's office specifically said that there had been
3 no determination of whether they were violating the law. It was
4 an inquiry to open an investigation based on complaints that
5 were received from many members of the public. And that, again,
6 was only communication that any of the defendants have issued to
7 anyone in the state regarding the possible application of the
8 WLAD to a religious organization.

09:20:23 9 That is simply not sufficient to meet the second
10 criteria, to show a specific and credible threat of prosecution.

11 On the third point, the history of past prosecution or
12 enforcement of the challenged statute, again, this is very
13 sparse. As UGM itself acknowledges, there simply is not a
14 history of past prosecution enforcement of the WLAD against
09:20:46 15 religious organizations as employers.

16 Now, UGM suggests that the reason for the sparse
17 enforcement is because the *Woods* decision is only two years old,
18 the decision from the Washington Supreme Court that is
19 essentially what UGM is challenging in this case. However, UGM
09:21:06 20 entirely ignores that in 2014 the Washington Supreme Court in
21 *Ockletree V. Franciscan Health Systems* also had held that the
22 WLAD's religious employer exemption was unconstitutional as
23 applied to a particular plaintiff. And in that case what we
24 would regard as the controlling opinion in this case by Justice
09:21:32 25 Wiggins indicated that the WLAD could be applied against a

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1 religious employer in cases where the job duties of the employee
2 were wholly unrelated to religious -- religious belief or
3 practice.

4 So it's been almost ten years since the Washington
09:21:50 5 Supreme Court has held that the WLAD's religious employer
6 exemption can be, in appropriate cases, applied to religious
7 employers. And in that history, there is simply no record that
8 defendants, or anyone else, has brought an enforcement action
9 against UGM based on its religious hiring practices. That,
09:22:17 10 again, would mitigate against finding that there is a credible
11 threat of prosecution, because the history of past prosecution
12 and enforcement is simply not there.

13 When we're looking at cases that address injury in fact,
14 this case is more like the cases we cited in our brief, the
09:22:34 15 *School of Ozarks v. Biden*, for instance, from the Eighth Circuit
16 and *Thomas v. Anchorage Equal Rights Commission*, cases where
17 there simply was not enough to show that there was a credible
18 threat of prosecution against the party who was seeking to bring
19 a pre-enforcement challenge to a statute.

09:22:54 20 Turning to the second prong of standing, causation, in
21 order to have standing, plaintiffs have to show -- a plaintiff
22 must show that their alleged injuries are fairly traceable to
23 the actions of defendants. Here, there's really no evidence or
24 allegation that defendants have done anything to cause any
09:23:18 25 injury to UGM.

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1 In the complaint, UGM complains primarily about the
2 conduct of third parties towards them, particularly posts that
3 appeared on Reddit, posts that -- or voice-mails that were
4 received by them from third parties. But defendants are not
09:23:39 5 responsible for that, and the conduct that allegedly chills
6 their speech is not fairly traceable to defendants.

7 At bottom, what UGM is unhappy about in this case is the
8 *Woods* decision from the Washington Supreme Court. The *Woods*
9 decision goes to some -- you know, the *Woods* decision was an
09:24:01 10 as-applied challenge to the religious employer exemption under
11 the WLAD. It did not, as UGM suggests, open the door to, I'd
12 say, the parade of horrors that they have put forward in this
13 case. It was an as-applied challenge to the religious employer
14 exemption.

09:24:24 15 The Washington Supreme Court was very careful in its
16 analysis. Contrary to what UGM has suggested, the Washington
17 Supreme Court did look to federal constitutional law very
18 carefully in its analysis, and under the facts of that case,
19 they decided that the plaintiff in the case, Matthew Woods,
09:24:45 20 could proceed forward with his case, but they did not rule in
21 his favor. Instead, the Court said that if Mr. Woods could show
22 that the position he sought at the Seattle Union Gospel Mission
23 was a non-ministerial position -- he was seeking a position as a
24 lawyer in their legal aid clinic -- that he could have a valid
09:25:07 25 claim under the WLAD against Seattle Union Gospel Mission.

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1 And what *Woods* emphasizes is that -- again, this was an
2 as-applied challenge. The Washington Supreme Court upheld the
3 facial constitutionality of the WLAD's religious employer
4 exemption. It did not strike it down. It was a decision that I
09:25:30 5 think will have to be applied in future cases on a case-by-case
6 basis, as one would do with as-applied challenges.

7 UGM's fears that it's going to be subject to enforcement
8 action at this point is simply speculation because they've
9 received no kind of threat from any of the defendants of such an
09:25:49 10 action.

11 But the issues here also get to the point in *Woods* that
12 *Woods* was a state court decision by the highest court of
13 Washington state. Seattle's Union Gospel Mission sought review
14 of the decision in the US Supreme Court, and the US Supreme
09:26:08 15 Court denied review of that case. At this point, to the extent
16 that UGM is challenging the *Woods* decision in this case, they
17 cannot ask this Court to review it; only the US Supreme Court
18 can review the *Woods* decision. This Court cannot overturn the
19 *Woods* decision.

09:26:28 20 UGM tries to suggest that it's not challenging the *Woods*
21 decision, but that assertion is contradicted in its complaint,
22 which repeatedly cites *Woods*' narrowed interpretation of the
23 WLAD as the basis of their alleged injuries, and explicitly
24 requests a declaration that this narrowed interpretation is
09:26:46 25 unconstitutional.

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1 And these are getting to redressability questions, Your
2 Honor, because any decision by this Court on plaintiff's
3 complaint would not be binding on Washington state courts.
4 *Woods* would still be the applicable -- would still be applicable
5 in Washington state courts, and UGM would still be potentially
6 open, in state courts, to lawsuits by private parties to enforce
7 the WLAD.

8 UGM's complaint here alleged that its First Amendment
9 rights are being chilled by the *Woods* decision. And to the
10 extent the Court can offer any relief on that, it can't do
11 anything in this action to restrain private parties from
12 enforcing the WLAD, potentially, against Union Gospel Mission.
13 And that defeats redressability in this case because any order
14 by this Court will not relieve UGM of the potential of threat of
15 a WLAD lawsuit. And UGM itself points to the threat of lawsuits
16 by private parties as one of their alleged injuries, in
17 Paragraph 165 of their complaint. They also mention this is a
18 potential -- is an injury in their reply brief on the motion to
19 dismiss.

20 Now, there's not a whole lot of case law that considers
21 this kind of issue, but I will note that in the *Whole Woman's*
22 *Health v. Jackson* decision, which we discussed in our brief, and
23 I discussed earlier here, the statute that was being challenged
24 in that case was Texas' law that essentially sought to prevent
25 pre-enforcement review of a statute that restricted abortion in

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1 the state by giving only private parties the right to enforce
2 the law. Parties -- the Attorney General of Texas, along with
3 others, was nonetheless sued in that case by people who were
4 challenging -- wanted to challenge the constitutionality of the
5 law. But the Court held that they could not sue the Attorney
6 General because the Attorney General did not have the authority
7 to enforce the law.

8 But in making this decision, Justice Gorsuch emphasized
9 the point that even if the Attorney General of Texas had the
10 authority to enforce the law -- to enforce the law, any
11 injunction that the Court could issue would only apply to the
12 defendants before the Court. It would not apply to the private
13 parties who would also be able to bring enforcement actions
14 against people who were seeking abortions or who violated the
15 law.

16 And that goes, I think, again to the issue of
17 redressability here, where the US Supreme Court was recognizing
18 that -- you know, without using the term "redressability," that
19 it's not -- the Court cannot provide effective relief in a case
20 where somebody is challenging a law that private parties are
21 just as well equipped to enforce as government officials. And,
22 indeed, under Washington state law, the Washington Supreme Court
23 has emphasized that private parties are essential to enforcement
24 of the WLAD and, in fact, serve as private attorney generals
25 [sic] when they bring actions under the WLAD.

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1 So redressability in this case is -- cannot be provided
2 by this Court because there's no ability of this Court to
3 immunize UGM from the alleged injuries they complain about.
4 They complain about the possibility that the WLAD will be
09:30:25 5 enforced against them, and this Court cannot restrain everyone
6 in the state from -- from doing that.

7 So that's, again, where redressability is a key issue in
8 this case.

9 Finally, I would like to turn to the issue of ripeness.
09:30:44 10 Prudential ripeness -- under the prudential ripeness doctrine,
11 courts look to whether a case is fit for review, as well as
12 hardship in withholding a decision in determining whether the
13 Prudential ripeness prong is met. Two factors are key in
14 determining the fitness of issues of review. One is that the
09:31:04 15 issues -- are the issues purely legal? And two, is the
16 challenged action final?

17 Now, here, the issues that are in this case are not
18 purely legal, as UGM suggests. Instead, as I noted earlier,
19 UGM's own pleadings in this case create, at least at minimum, a
09:31:25 20 contradiction about whether they employ ministerial or
21 non-ministerial employees, or both. If they only employ
22 ministerial employees, as their exhibits to their complaint
23 suggest, the WLAD doesn't apply at all to them, and anything
24 that this Court would do would simply be an advisory decision --
09:31:45 25 I'm sorry, an advisory opinion. And so further factual

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1 development would be required in order to resolve that issue.

2 Also here, the challenged action by UGM is not final.

3 To the extent they're -- you know, the action they're

4 challenging is enforcement of the WLAD, there's just no

09:32:08

5 enforcement history at all by defendants against UGM, and the

6 only enforcement -- alleged enforcement action that they point

7 to is a single letter that was sent to Seattle Pacific

8 University, which is also not a final action, because that

9 letter indicated that the Attorney General's office had not made

09:32:28

10 any determination that there was a violation of the law but was

11 simply seeking information.

12 THE COURT: Isn't one of UGM's arguments that they are

13 entitled as one of the -- the First Amendment rights they are

14 asserting to hire only people of their own religion,

09:32:48

15 co-religionists? And isn't that a purely legal issue as opposed

16 to the underlying factual inquiry that would be necessary to

17 determine ministerial and non-ministerial employees? Isn't

18 the -- one of the other arguments they assert, about their

19 entity should have the right to hire only co-religionists, isn't

09:33:05

20 that purely a legal issue?

21 MR. WARD: Your Honor, that would be purely a legal

22 issue if they actually had, but it's not one that should be

23 reached if they don't have standing to maintain this action in

24 the first place. That is an issue that really should be teed up

09:33:17

25 in a case where you're not dealing with an employer who you

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1 can't even tell whether they have non-ministerial employees,
2 because otherwise, if they only employed ministerial employees,
3 there's no need to reach the co-religionist issue at all because
4 they would not be subject to the WLAD.

09:33:37 5 So in closing, Your Honor, I would like to urge the
6 Court to dismiss UGM's complaint with prejudice for lack of
7 standing or lack of ripeness. And I would also just echo what
8 the Ninth Circuit said in *Thomas v. Anchorage Equal Rights*
9 *Commission*, that this is a case in search of controversy, and
09:34:06 10 it's not judicable, for the reasons we've discussed in our
11 briefing and here today.

12 Thank you, Your Honor.

13 THE COURT: Thank you.

14 All right. Mr. Tucker, are you making the arguments on
09:34:18 15 behalf of the plaintiffs?

16 MR. TUCKER: (Inaudible.)

17 THE COURT: Oh, Mr. Tucker, I think you might be on
18 mute, sir.

19 MR. TUCKER: I'm terribly sorry, Your Honor.

09:34:27 20 THE COURT: That's all right.

21 MR. TUCKER: Yes, the answer to the question is "yes."

22 Ryan Tucker on behalf of the Union Gospel Mission of
23 Yakima.

24 I'll start first with the Court's question that it posed
09:34:42 25 both last week and then also this morning as to whether or not

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1 the case should be stayed pending the outcome in *SPU v.*
2 *Ferguson*. I'm pleased to report, at least initially, we agree.
3 We agree with the defense that the case should not, in fact, be
4 stayed, but here's why. There's really three different, I
09:35:01 5 think, reasons why that is the case.

6 First is the fact that the Mission continues to have
7 ongoing harm. It's chilling its speech. It has a religious
8 hiring statement that it would like to post. It has two
9 non-ministerial positions.

09:35:19 10 And, Your Honor, if I could just pause for a moment, I
11 think there's some feedback. I don't know if that's on -- I
12 just want to make sure Your Honor can hear me.

13 THE COURT: I'm not having any feedback issue.

14 Is -- I just want to confirm: Is everyone else muted?
09:35:32 15 Because sometimes that can happen when someone is not muted.

16 MR. TUCKER: Okay.

17 THE COURT: Okay. All right. Is the feedback
18 distracting to you, Mr. Tucker?

19 MR. TUCKER: No, I --

09:35:40 20 THE COURT: Okay.

21 MR. TUCKER: No, I can manage.

22 THE COURT: Okay.

23 MR. TUCKER: So, I'm sorry, Your Honor, going back,
24 there's three different reasons. First is the continuing,
09:35:49 25 ongoing harm that the Mission has. It's chilling its speech.

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1 It has a hiring statement. It has two non-ministerial positions
2 that it would like to post, two that it would like to fill by
3 July 1st, this fiscal year. And in order to do that, it
4 necessarily needs relief from this Court.

09:36:10 5 And in addition to those two non-ministerial employees,
6 the Mission also has approximately four dozen positions
7 throughout the year that it needs to -- to hire. Excuse me.

8 So I think just from a practical perspective -- sorry,
9 Your Honor -- we have a case that's pending at the Ninth. We
09:36:40 10 don't know when the Ninth is actually going to issue its
11 decision. And so the Mission is simply not in a position to be
12 able to wait a year, let alone months, or even weeks, for a
13 final determination from the Ninth. So the ongoing harm is the
14 first reason why.

09:36:58 15 The second one is the fact that the claims and the facts
16 in the *SPU* case are -- are different. If you look at the
17 underlying complaint brought by Seattle Pacific, they bring
18 claims of retaliation, targeting, hostility. Those are claims
19 that -- that we do not allege in this lawsuit. They also
09:37:19 20 underscore the need for declaratory relief relative to the
21 ministerial exception. The ministerial exception claims are not
22 claims that we have brought also in this lawsuit. The
23 ministerial exception claims, though, however, I think were at
24 least part and parcel to the -- to the reason why the -- the
09:37:42 25 judge, Judge Bryan, chose to dismiss that case on redressability

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1 grounds. He looked at it and said, "Well, wait a second. I'm
2 going to have to go through and potentially parse through all of
3 these different positions to determine whether or not they're
4 ministers or not."

09:37:57 5 We're not asking for that here. There's no need for the
6 Court to do so.

7 The third reason why the -- the case, I think, should
8 not be stayed, it has to do with what Judge Bryan found really
9 to be the most important reason why that case was dismissed, and
09:38:17 10 that deals with the abstention issues. On the one hand, the
11 defendants are saying, "Look, we sent a letter. Because of that
12 letter, the ongoing quasi-criminal investigation, SPU can't have
13 its day in court because of abstention grounds." So the one
14 hand they're saying that. They're saying abstention requires
09:38:42 15 dismissal there. And then they come over here to this case and
16 say, "Well, guess what? You guys didn't get a letter, and so
17 there's no case or controversy."

18 Under the defendants' theory, Seattle -- the Union
19 Gospel Mission of Yakima could never have its day in court. And
09:38:57 20 so I think, you know, that issue alone again underscores why not
21 just the fact that the stay would be inappropriate but also
22 underscores the rights that -- that Yakima has to being in court
23 here today.

24 Now, let me sort of transition here to some of the
09:39:19 25 arguments that opposing counsel referenced, and let me sort of

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1 frame this with this overarching point, and that is the fact
2 that this case is about whether, really, the state can force a
3 religious organization to hire employees who do not share its
4 religious beliefs. The Union Gospel Mission of Yakima believes
09:39:43 5 the answer to that question is certainly "no," as doing so would
6 not only undermine its autonomy, but would actually put into
7 question its continued viability.

8 It was started in 1936. It was founded as a Christian
9 ministry to serve the less fortunate and to spread its religious
09:40:03 10 beliefs and ideals in that community. Because the Mission is a
11 religious organization, just like a house of worship, it
12 maintains an internal community of like-minded believers who
13 agree with and adhere to its religious beliefs, so that the
14 Mission is able to effectively and accurately further its
09:40:22 15 ministry work.

16 Yet, the Washington Law Against Discrimination, WLAD,
17 impedes the Mission's ability to do just that by penalizing the
18 Mission for employing only those who are completely on board
19 with religious beliefs. This isn't hypothetical. It's
09:40:40 20 concrete. In fact, the Attorney General made that very clear,
21 that the First Amendment does not protect non-ministerial
22 employees. So that's why the Mission brought this lawsuit,
23 that's why the Mission paused hiring for its two open
24 non-ministerial positions, again, positions it hopes to fill by
09:41:00 25 July 1st, and withheld its speech on those topics, all to avoid

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1 WLAD enforcement and penalties.

2 As opposing counsel referenced, there are -- turning to
3 the standing arguments, of course, there are three standing
4 elements. The *Susan B. Anthony List* outlines those well, the
09:41:17 5 Supreme Court decision from 2014, the first being injury in
6 fact. And when we look at injury in fact, there are three
7 elements below that. The first one: Whether the plaintiff has
8 alleged an intention to engage in a course of conduct arguably
9 affected the constitutional interest. Defendants don't really
09:41:35 10 challenge that one.

11 They also don't really challenge the -- whether the
12 conduct is arguably prescribed by the law being challenged. So
13 again, that one is not really at issue.

14 But I would say, as an aside, because I do think this is
09:41:48 15 a very important admission by the Attorney General in the *SPU*
16 case, if you look at Page 17 of their motion to dismiss, they
17 say very clearly that the First Amendment clearly protects, it
18 goes on to say, employment practices with respect to its
19 ministers, but those protections do not extend to discrimination
09:42:08 20 against, and it goes on, non-ministerial employees whom the
21 WLAD's prohibition of employment discrimination on the basis of
22 sexual orientation applies.

23 So it's very clear that to the extent you have
24 co-religionists, people that do not classify as ministers, that
09:42:28 25 you are in trouble and in potential violation of the WLAD.

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1 The element under injury in fact that opposing counsel
2 focused primarily on, and where we have the greatest
3 disagreement, is this credible threat of enforcement. And as
4 Mr. Ward mentioned, you look at the *Thomas* factors, and when
09:42:49 5 analyzing those *Thomas* factors, the first is whether or not
6 there's a concrete plan -- whether the plaintiff has alleged a
7 concrete plan to violate the law. This one, again, is not at
8 issue. We have alleged that in our complaint, that we intend to
9 resume hiring on Indeed.com, that we would like to continue
09:43:09 10 hiring only co-religionists for its IT technician and operation
11 assistant, and, really, for other non-ministerial positions as
12 well, but for the WLAD and its enforcement.

13 The second one that counsel spent some time on was
14 whether or not there's a specific warning or threat. And I
09:43:31 15 really want to emphasize to the Court the importance of some
16 recent Ninth Circuit case law that I think is directly on point.
17 One is the *Tingly* decision from 2022. Its standing analysis is
18 on point here. And there the Court said you don't need a
19 specific threat to the Mission. I don't have to receive a
09:43:54 20 letter from the Attorney General or from the Commission in order
21 to be able to meet this -- this element. In fact, very
22 importantly, *Tingly*, and other Ninth Circuit cases, says that
23 the failure to disavow is -- is enough. If you read *Tingly*, it
24 says: We have interpreted the government's failure to disavow
09:44:17 25 enforcement of the law as weighing in favor of standing.

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1 We -- we see that also in the *Italian Colors* case. We
2 see that also in *Cal Trucking*, which is another important Ninth
3 Circuit decision, where there was an opportunity during the
4 hearing itself for opposing counsel to disavow. And the failure
09:44:40 5 to disavow meant that there really -- there is a case in
6 controversy.

7 So I think here the main point is the defendants really
8 have to answer the question: Either the Union Gospel Mission
9 can hire those who it wants to hire or it can't. If defendants
09:44:58 10 say, "Well, we are not sure, it's unclear," then we get to stay
11 in court. If the defendants want to say, "Sure, go ahead, you
12 can hire who you want," well, then I admit that we wouldn't have
13 a case or controversy. But we've had this case on file for two
14 months, and I have not heard that to this point.

09:45:16 15 Past enforcement, this third *Thomas* factor, I think is
16 the least important as far as when you -- when you weigh them.
17 Here we still have -- have checked the box, if you will, on this
18 one. The issue of -- or the history of past enforcement carries
19 little weight when the challenged law is either new or even, in
09:45:39 20 this instance, when there has been little enforcement or a
21 recent change to its enforcement. The *Tingly* case again
22 discusses that.

23 THE COURT: What about -- what about defendants'
24 argument that the change in law really isn't all that recent,
09:45:53 25 that the Court signaled its understanding of the law or its

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1 interpretation of the law back in *Ockletree* in 2014, so the
2 change really isn't that recent, so the fact that in nine years
3 there's been no enforcement of the way that plaintiffs are
4 concerned about, with the exception of one letter sent to SPU,
09:46:12 5 so how do you respond to that?

6 MR. TUCKER: A few different responses. First off, Your
7 Honor, I respectfully disagree with the, I think, opposing
8 side's view of *Ockletree*. Of course, that is not shocking,
9 because I think there's law review articles trying to figure out
09:46:27 10 exactly what that case meant. That was a very fractured
11 decision, and even the concurring opinion that's cited by
12 opposing counsel is -- I don't agree that that is actually what
13 that case held.

14 But putting aside our disagreement as to what *Ockletree*
09:46:44 15 actually says in 2014, the reality is we have ongoing harm now,
16 and we have enforcement now, by government officials
17 interpreting the law now to provide that -- that religious
18 organizations, like the Mission, no longer have the ability to
19 hire non-ministerial employees. That -- that enforcement did
09:47:08 20 not happen until this past year, after the Attorney General
21 decided to go after a similarly situated religious organization
22 like Seattle Pacific.

23 And, again, if you look at -- you know, the fact is we
24 don't need an actual letter directed to us. The fact that past
09:47:31 25 enforcement -- again, it's not even necessary to have past

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1 enforcement at all, but even the fact that they've gone after a
2 similarly situated entity, if you look at the *Lopez* case, a
3 Ninth Circuit decision from 2010 that we cite in our papers, it
4 says that as well.

09:47:48 5 Moving to the second, *SBA List* factor, causation and
6 traceability, I think the main point there, Your Honor, just
7 sort of jump to the chase on that, is the causation. Causation
8 is met when the defendants have -- have authority to -- to
9 enforce the law.

09:48:11 10 Here, you know, we have sued the defendants that have
11 that ability. When you look at, in 1983 actions, it's the state
12 official's power to enforce the challenged provision that
13 demonstrates that requisite causal connection for standing
14 purposes. That's the *Planned Parenthood* case out of the Ninth
09:48:34 15 Circuit in 2004.

16 You know, and, again, the real injury here is the
17 enforcement of the WLAD, not the actions of third parties. We
18 do include what is going on on the outside, the fact that we
19 have, in fact, been the target of inquiries from others that do
09:48:58 20 not care for our religious beliefs. They have had Reddit
21 exchanges; we've received voice-mails. That's really color to
22 further underscore the concern. But if you go back and look
23 even at the *Tingly* case again, you've got a Christian counselor
24 who didn't have any of that. There he was chilling, and there
09:49:17 25 was the failure by the defendants to disavow that led to -- to

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1 standing.

2 The third component on *SBA List* is redressability. This
3 one, really the burden, in fact, is -- on us is -- is minimal, I
4 would say, or modest when you look at court precedent. There,
09:49:40 5 in the *Lujan* decision, the Supreme Court case a few years back,
6 said that if the plaintiff is an object of the law, there's
7 ordinarily little question that the action or inaction caused
8 him injury, and then a judgment preventing or requiring the
9 action will redress it.

09:49:55 10 I think the main argument that defendants make here is,
11 well, wait a second, look, these guys simply want to relitigate
12 *Woods*. No, Your Honor, that -- the distinction here is -- you
13 know, we're not asking the Court to declare that the Washington
14 Supreme Court decision in *Woods*, that they erred in
09:50:17 15 interpretation of the state constitution.

16 What we're asking for here is to declare that the WLAD,
17 as it sits today, and enforcement of that law by Washington
18 state officials, infringes on the federal Constitution. And I
19 think importantly, if you go back and look, yes, there was a
09:50:38 20 cert denial in that case, but I think the statement by Justice
21 Alito actually really crystallizes, in fact, how we ended up
22 here today. You know, Justice Alito says that the Supreme
23 Court -- the Washington Supreme Court's decision there to
24 narrowly construe the Washington religious exemption (inaudible)
09:51:00 25 avoid the conflict with the state constitution may have created

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1 a conflict with the federal Constitution. That's exactly why
2 we're here today.

3 So we're not here to have a second bite at the apple at
4 *Woods*. We're here because of a federal constitutional issue.

09:51:15 5 And if you think about it, too, in the context -- let's say that
6 the legislature, for example, had simply amended the WLAD this
7 last year. I wouldn't be suing the Washington legislature as a
8 result. Instead, what you would do is you would sue those who
9 are actually enforcing it.

09:51:31 10 Well, that's exactly what we've done here. We've sued
11 the government enforcement officials that can pursue complaints
12 against the Mission itself.

13 You know, there's also -- there was some concern about,
14 you know, whether or not, you know, relief relative to some
09:51:56 15 injury was enough. If you look at the *Larson* case, again, out
16 of the Ninth Circuit, 450 -- or, I'm sorry, the *Larson* case out
17 of the United States Supreme Court held that an injunction that
18 relieved some injury is sufficient in the redressability
19 analysis. The *Wolfson* case we also cite, Ninth Circuit, also
09:52:17 20 bolsters that argument, and I will rely on that briefing and not
21 regurgitate it ad nauseam.

22 Before I turn briefly to ripeness, you know, again,
23 there were a couple points that opposing counsel made. There
24 was a reference to *Whole Woman's Health*, a US Supreme Court
09:52:40 25 decision. You know, there I think it's important to recognize

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1 that the Court there, in looking at the standing analysis, you
2 know, held that there was no case or controversy as to certain
3 defendants. Standing was appropriate (inaudible) some
4 defendants, but standing was not appropriate against the state
09:53:03 5 court judge and the state court clerk. Here we have the right
6 enforcement officials. It's really apples and oranges to our
7 particular situation.

8 Counsel also referenced, I think in passing, the *Yellen*
9 decision. Again, I -- I go back to the well on this. A failure
09:53:24 10 to disavow means that we have the right to be here in court.
11 The *Yellen* case actually says that directly on Page 850, citing
12 again *Cal Trucking*, which is another Ninth Circuit decision. So
13 if you look at really the Ninth Circuit case law in the last
14 36 months, 48 months, it really spells out exactly why we have
09:53:46 15 standing in this particular case.

16 Now, as to ripeness, I agree again with opposing
17 counsel's comment that -- you know, and Your Honor's question
18 relative to, well, if I'm only asked to comment whether or not
19 we've got a right to hire co-religionists, isn't that a legal
09:54:05 20 issue, it is. And this is a purely legal matter. There was a
21 reference to the fact that, well, wait a second, if you look at
22 their exhibits, they're being unclear about the fact that
23 they -- who they call ministers and who they don't.

24 Well, obviously, this Mission is a Christian ministry.
09:54:27 25 We cite several paragraphs in our complaint talking about the

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1 fact that we believe, and that Yakima Mission believes, that
2 it's called by Christ to share the gospel, and so they are on a
3 mission to share the gospel of Christ with others. In that
4 sense, they do consider themselves to be ministers in a biblical
09:54:47 5 sense, but there's a difference between being a minister in the
6 biblical sense and a minister for purposes of the law, and we
7 have readily admitted that there are certain positions at
8 Yakima, including the very two that we need to hire within 30
9 days, that are non-ministerial positions. Those are positions
09:55:05 10 that -- that look -- that are -- that are inward in nature,
11 meaning there's an importance to being able to maintain a
12 framework of like-minded individuals in a religious institution.

13 If you think about an individual like Mr. Woods, even in
14 the Seattle case, who says, "I want to come into this religious
09:55:30 15 organization, and I want to change your belief system because I
16 disagree with it," that will unravel the very fabric that binds
17 that institution together. And, again, Justice Alito, in the
18 statement denying that cert petition -- and the reason that case
19 went back down is because the Supreme Court looked at it and
09:55:53 20 said, "Not now"; the procedural posture. But I think the
21 warning that Justice Alito gave there, the very fact that if
22 religious organizations don't have the right to -- to bring on,
23 to hire those that are like-minded, then that will completely
24 destroy religious organizations in toto across the board.

09:56:14 25 I'm going to hold -- I have additional thoughts on that,

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1 but they're more merits-based, and so I think with that, if Your
2 Honor doesn't have any questions, I can -- I can rest on the
3 briefing that we have relative to the motion to dismiss.

4 THE COURT: All right. I do not at this time.

09:56:31 5 I'll turn back to Mr. Ward.

6 MR. WARD: (Inaudible.)

7 THE COURT: Oh, you're on mute, Mr. Ward.

8 MR. WARD: Sorry. I knew I would do that.

9 THE COURT: That's all right.

09:56:50 10 MR. WARD: Thank you, Your Honor.

11 I would like to make a few points in response, in
12 rebuttal. First, I appreciate that Your Honor brought up the
13 *Ockletree* case, because it was literally ignored by the briefing
14 of plaintiffs in this case, and it is a decision that has been
09:57:12 15 in effect for nine years, and there has been no enforcement
16 authority actions that they can point to under that.

17 UGM seems to suggest that the case law says that
18 basically they have standing regardless of any -- you know,
19 having received no communication from us, having received --
09:57:32 20 having such a sparse history of enforcement. But that's not
21 simply what the cases stand for. I mean, the *Tingly* case, for
22 instance, concerned a new statute that was only on the books for
23 a few months, that it had clearly applied to the party who was
24 bringing the challenge.

09:57:50 25 Here, we have court decisions from the Washington

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1 Supreme Court going back to 2014 that have held that religious
2 employers, under proper circumstances, may be subject to
3 as-applied challenges under the WLAD and no history of
4 enforcement. That is a key distinction. I mean, a key
09:58:12 5 distinction as well in the *Yellen* and *Cal Trucking* cases that
6 were cited by UGM is that in those cases, the defendants had
7 actually -- the state officials had actually issued letters to
8 the parties -- I'm sorry, the people challenging the law,
9 indicating that the law would be enforced against them or they
09:58:33 10 interpreted the law as being, you know, enforced against them.
11 And we simply don't have that here with UGM. We don't even have
12 that with SPU. I mean, in the *SPU* case, the Attorney General's
13 letter simply said that it was opening an inquiry based on
14 complaints, and that it made no conclusion that there was a
09:58:52 15 violation of law.

16 On the issue of, you know, reaching the co-religionist
17 issues in this case, I will point out, I mean, in *Woods* --

18 THE COURT: Mr. Ward, before --

19 MR. WARD: Please.

09:59:05 20 THE COURT: -- before you move on, and I have not --
21 obviously, I think only one brief has been filed with respect to
22 the *SPU* matter. It's my understanding Judge Bryan did not
23 decide but assumed for the purposes of the decision in that case
24 that the first two factors of standing were met.

09:59:23 25 Is that an issue as to the briefing that's taking place

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1 before the Ninth Circuit right now?

2 MR. WARD: Your Honor, in their opening brief, Seattle
3 Pacific University did brief the injury-in-fact issue.

4 THE COURT: Okay.

09:59:36 5 MR. WARD: But we have not filed our response brief yet.

6 THE COURT: All right. Well, I --

7 MR. WARD: I don't recall if there was causation. Yeah.

8 THE COURT: Since it's due on Friday, I expected you
9 might know whether there's going to be some discussion of injury
09:59:47 10 in fact.

11 MR. WARD: Yes, Your Honor. I can disclose that there
12 will be some discussion of that, yes.

13 THE COURT: Okay. I'm just trying to analyze what
14 issues are likely to be before the Ninth Circuit that are
09:59:57 15 substantially related to the issues here, because one of the
16 issues is: Is the letter that SPU sent, if that is not an
17 injury in fact for SPU, I don't see how it would be for UGM.
18 And so that is one of the issues I'm analyzing, is the
19 likelihood that that particular issue is before the Ninth
10:00:17 20 Circuit in terms of deciding about whether it's appropriate to
21 proceed now or see what the Ninth Circuit has to say about that
22 particular issue, given the context.

23 So thank you for the answer.

24 MR. WARD: Okay. Yes, Your Honor.

10:00:27 25 On a few other points to address, on redressability, the

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1 ability of private parties to sue to enforce the WLAD, in
2 addition to the defendants in this case, is a key distinction
3 between this case and the *Wolfson* case that UGM has pointed to.
4 In the *Wolfson* case, the Ninth Circuit held that a challenged
10:00:54 5 judicial canon that restricted the speech of judicial candidates
6 in Arizona could be redressed through a favorable decision by
7 the Ninth Circuit because the injunctive relief was sought
8 against everyone who had the authority to enforce the law. The
9 Court said, without a possibility of enforcement, there's
10:01:15 10 redressability and there's, therefore, standing.

11 But again, here we just have a case where any actions
12 taken by this Court will not restrain private parties from
13 having the ability to bring a WLAD action if they are aggrieved
14 under the WLAD and believe that they have been discriminated
10:01:33 15 against in employment by the Union Gospel Mission, and this is
16 something that can't be controlled.

17 I would also, I think, point out the question of co --
18 whether UGM has a right to hire only co-religionists under the
19 First Amendment, that's obviously a merits issue. That's not
10:02:00 20 really appropriate for us to get into the merits of that on
21 especially a motion to dismiss. But the question of whether,
22 you know, UGM can only hire co-religionists and has a right to
23 do so was one that the *Woods* decision, while not -- did, in
24 effect, reach under the facts of that case because in that case,
10:02:23 25 Mr. Woods made it clear that -- to Seattle Union Gospel Mission

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1 that he disagreed with Seattle Union Gospel Mission's positions
2 on marriage of same-sex couples and sexual intimacy between
3 same-sex couples. And the Court really could not have ruled in
4 the way it did in *Woods* if it believed that his disagreement
10:02:50 5 with SUGM, Seattle Union Gospel Mission's, religious beliefs on
6 sexuality and marriage were a basis for -- a legitimate basis
7 for them to refuse to employ him as a -- if he were a
8 non-ministerial employee.

9 So that's, you know, a case where I think *Woods* does not
10:03:13 10 address that issue explicitly, but implicitly, I believe the
11 *Woods* decision does say that co-religious -- did reject, in a
12 sense, the co-religionist argument that is being advanced here.

13 And finally, Your Honor, I would note that, you know,
14 Union Gospel Mission again has said here that they are not
10:03:42 15 asserting that any of their employees -- particularly the
16 operations assistant and the IT technician positions, are --
17 they're not asserting that those are ministerial positions, but
18 again, if you look at their complaint, Exhibit 4 to the
19 complaint asserts that all employees of Union Gospel Mission are
10:03:59 20 ministers by -- what are known as ministers by law and court
21 decision. So that's not in the biblical sense, that is in the
22 legal sense that they've taken that position before, so I think
23 there is, again, some matter of factual dispute as to whether --
24 and it's unclear to us, whether UGM does, in fact, employ
10:04:20 25 non-ministerial employees.

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1 So with that, Your Honor, I will conclude and again urge
2 the Court to dismiss UGM's complaint for lack of justiciability.

3 Thank you.

4 THE COURT: Mr. Tucker, anything further on the motion
5 to dismiss?

10:04:36

6 Oh, Mr. Tucker, you're on mute.

7 MR. TUCKER: I'm sorry, Your Honor.

8 THE COURT: That's all right.

9 MR. TUCKER: As to that -- yes, I would like just a
10 couple of things in response.

10:04:48

11 As to the latter point, on whether or not the Mission
12 itself has created some sort of factual dispute based on the
13 filings with the Court, Justice Thomas, maybe one other on the
14 Supreme Court, has certainly indicated that they believe that --
15 or that religious organizations should have the right to declare
16 for themselves who ministers are. And as much as I would like
17 that to be the law of the land, there are not five votes at the
18 US Supreme Court right now that actually say that.

10:05:12

19 Now, if opposing counsel, if -- if the -- if the
20 defendants want to admit that every single employee at the Union
21 Gospel Mission is, indeed, a minister, then I would agree that
22 we don't have an issue here. But the reality is we have
23 positions that we ourselves view as non-ministerial; we have
24 admitted as much and said as much in our -- in our filings. If
25 you look, of course, even at the job descriptions of an IT tech

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1 professional, as well as an administrative assistant, then I
2 think that further underscores that.

3 And interestingly enough, there was actually a case just
4 this Friday out of North Carolina -- I'm sorry, out of Florida,
10:06:17 5 the Middle District of Florida in a case styled *Ratliff v.*
6 *Wycliffe Associates* -- yeah, *Associates*, where the Court looked
7 at that and likewise -- you don't have -- Your Honor doesn't
8 need to go here because you don't need to analyze whether or not
9 this is a ministerial position or not, but I don't think there's
10:06:36 10 any question whether it's judicially or, certainly with us, as
11 to whether or not an IT professional is -- is a minister or not.
12 The terms used internally, again, are because we have a mission
13 to spread the gospel message, so that is why the term "minister"
14 is used.

10:06:56 15 Your Honor mentioned some -- you know, what you were
16 grappling with was this idea of the letter, the importance of
17 the letter. The reality is we don't need a letter for -- to
18 have standing. I think *SBA List* says that. I think *Tingly* says
19 that as well. Our injury is really different. We've got a
10:07:19 20 self-chill. We're not -- and the inability to hire. We have
21 not sued the Attorney General saying that "you're retaliatory
22 towards us, that you are hostile in -- in asking for truckloads'
23 worth of internal documents that we use to govern our own body."
24 That is not the challenge here. And so there's quite a bit of
10:07:45 25 difference.

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1 And like I said, if you go back and look at *Tingly*, if
2 you look at even the Ninth Circuit decisions like, I think, *Cal*
3 *Trucking* and even maybe *Yellen*, the important deciding factor
4 there is disavow, and the fact is -- still haven't heard it
10:08:04 5 today -- the failure to disavow means that we actually do, in
6 fact, have a case in controversy here as well.

7 On -- on *Wolfson*, on the redressability question there,
8 third parties can still file complaints even in that Ninth
9 Circuit decision. I think the fact that, and I think this -- I
10:08:27 10 think the analysis is bolstered actually by the documents that
11 the defendants have brought forth. They actually included in
12 their papers evidence of these third-party complaints that have
13 been -- that were brought both before this lawsuit and also
14 while this lawsuit has been pending. And so we've had at least,
10:08:46 15 I think, five different complaints filed against us, so I think
16 that shows that this is, indeed, a concrete concern.

17 And I'd say lastly, sort of moving backwards, the
18 *Ockletree* decision again, if you read that, if you look at the
19 part that the defendants are quoting there, there's disagreement
10:09:09 20 on that concurrence and what was actually meant by that. I
21 think if you read it, that judge was actually reframing what he
22 thought the appropriate inquiry should have been because they
23 were posed a question by the federal court. I just disagree
24 with that analysis. To me, again, it's neither here nor there,
10:09:29 25 because we're facing ongoing harm now, and the Attorney General

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1 didn't announce that they would enforce the WLAD on these
2 grounds until after the *Woods* decision, and so timing-wise, I
3 think that's -- that's an important piece of -- of this
4 analysis.

10:09:53 5 And then, also, I question why in the world *Woods* was
6 even necessary if *Ockletree* already resolved the issue. There
7 were a lot of questions that came as a result of that decision
8 from the Washington Supreme Court. And I think the clarity
9 came, though, post-*Woods* when the Attorney General said
10:10:12 10 pointblank: If you've got ministers, you're okay. If you have
11 non-ministers, you're not.

12 Guess what? Union Gospel Mission of Yakima has
13 non-ministerial positions, which means we're directly in the
14 bull's eye.

10:10:30 15 And with that, Your Honor, I -- I rest on our briefing.
16 I would respectfully ask the Court to retain the case, and I can
17 move on, Your Honor, towards the merits, if you'd like, or
18 pause.

19 THE COURT: Not quite yet. Mr. Tucker, a moment ago you
10:10:47 20 mentioned something about five complaints.

21 Can you expand on that? I just want to make sure I
22 heard you correctly.

23 MR. TUCKER: Yes, Your Honor. In the -- in response
24 to -- let me grab my notebook here.

10:11:01 25 In response to the motion for preliminary injunction,

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1 there were exhibits. There was a declaration by opposing
2 counsel -- or, I'm sorry, by -- there were a few different
3 complaints. There was an Exhibit A to the Gonzalez declaration.
4 That was a Commission complaint against the Mission alleging
5 disability discrimination. There was an Exhibit B to the
6 Gonzalez declaration; there was a complaint there against the
7 Mission alleging sex discrimination. Exhibit C was one
8 involving retaliation; D was regarding a contractor alleging
9 religious discrimination as well.

10 And in addition, Your Honor, to I think those
11 complaints, I think our standing is also bolstered by the fact
12 that if you look at our complaint, we actually cut and paste --
13 one of the applicants for an IT position gave some very hostile
14 responses to those inquiries, and so we've got both evidence of
15 the fact that individuals have actually filed complaints
16 historically, and then also we're dealing with it in realtime.

17 And, quite frankly, that's why we have the religious
18 hiring statement. One of the things that the Mission is trying
19 to do is to be abundantly clear to the public as to what its
20 position is so as to avoid someone coming in and saying, "Well,
21 gosh, I didn't really know these were your beliefs." We want to
22 be abundantly clear: We are who we are. We have beliefs on
23 biblical sexuality that some may agree with and others may not,
24 but we have the right -- and this starts to get into the
25 merits -- but we have the right to hire individuals that are

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1 like-minded, that believe like we do.

2 THE COURT: All right. Mr. Ward, it's defense's motion.
3 You get the final word.

4 Anything further?

10:13:06 5 MR. WARD: Yes, Your -- yes, Your Honor.

6 Just to pick up on the last point that was being raised
7 about complaints about the Union Gospel Mission that may have
8 been received by either the Attorney General's office or the
9 Human Rights Commission, none of those complaints have been
10 acted upon because, one, I mean, some of them are out of time,
11 some of them are brought by people who don't have coverage under
12 the WLAD as contractors. None of them are challenges to the
13 religious hiring practices of UGM. And I think even UGM would
14 acknowledge that it is subject to disability discrimination
10:13:45 15 claims and -- which was certainly an issue in the *Ockletree*
16 where disability discrimination was alleged and was found that
17 the WLAD's religious employer exemption did not apply there for
18 a non-ministerial -- well, for an employee whose duties were not
19 religious in nature.

10:14:03 20 So the fact that these complaints have been filed I
21 think just shows that there's a lack of complaints that have
22 been received by either, you know, the Human Rights Commission
23 or by the Attorney General's office over the religious hiring
24 practices that are at issue in this case, and again, go back to
10:14:20 25 the lack of enforcement and the lack -- which again turns to the

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1 lack of a concrete and particularized injury or an injury in
2 fact that has been suffered by UGM.

3 THE COURT: What about their argument that there's an
4 ongoing harm because they would like to hire consistent with
10:14:37 5 what they believe is their First Amendment rights, and they feel
6 as though they cannot do that because it would put them in
7 direct conflict with the way in which the Attorney General's
8 office says they interpret the statute? How is that not an
9 ongoing harm to the entity, that they cannot hire at this stage
10:14:53 10 positions that they need because of what they perceive as the
11 direct conflict?

12 MR. WARD: Your Honor, any alleged chill that they have
13 here is self-inflicted, in our view, because we have not
14 threatened any enforcement against them, we have not taken any
10:15:07 15 action against them, and there's been no investigation of them.
16 So, you know, this would be something that we view as a
17 self-inflicted harm that is not actionable.

18 THE COURT: So your position is that they actually have
19 to take the action that they would -- that they believe is
10:15:28 20 subject to First Amendment protection to expose themselves to
21 that liability before they have a sufficient concrete injury in
22 order to address these issues in court?

23 MR. WARD: Your Honor, I wouldn't say that. I would say
24 that they have to have something that is more concrete and
10:15:46 25 particularized than what we have here today, which is zero

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1 history of enforcement against them, zero threat of enforcement
2 against them by the Attorney General's office or any of the
3 defendants.

4 And I do believe that, you know, none of the cases that
10:16:02 5 have been cited here say that without some kind of a concrete
6 and particularized threat of an injury, that you have a basis to
7 bring this kind of a suit at this point.

8 THE COURT: Thank you. Anything further at this stage,
9 Mr. Ward, on the motion to dismiss?

10:16:22 10 MR. WARD: No, Your Honor. Thank you.

11 THE COURT: All right. We'll turn to the motion for a
12 preliminary injunction. That is plaintiff's motion, so I will
13 hear from Mr. Tucker first.

14 MR. TUCKER: Thank you, Your Honor.

10:16:32 15 When considering motions for preliminary injunction,
16 there are four standard factors that the courts often look at,
17 with primary focus, of course, on the likelihood of success
18 component. And so I'll get into these more substantively, but
19 there are four different claims, if you will, that we think
10:16:56 20 would allow us to receive preliminary injunctive relief.

21 The first, which I'll go into in greater detail here
22 momentarily, is, of course, the religious autonomy argument, the
23 fact that the WLAD intrudes on the Mission's autonomy and
24 freedom to decide for itself matters of internal governance.

10:17:21 25 The second one is free exercise, so separate and apart

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1 from religious autonomy. The reality is that the WLAD is not
2 generally applicable because it exempts small employers, and
3 I'll touch upon that in more detail here momentarily.

4 Third, certainly not third on our list, and I do want to
10:17:39 5 emphasize this -- this cause of action, expressive association
6 is another form by which the Court may give us relief, and
7 there, the WLAD forces the Mission to employ those who are not
8 totally aligned with its religious beliefs. And if you look
9 at -- there was recent case out of the Second Circuit just a few
10:18:01 10 months ago called *Slattery*, that's 61 F.4th 278, pinpoint cite
11 288, that is directly on point to what we have here, and so I
12 would encourage -- encourage the Court to focus on that.

13 And then lastly, speech as well. The WLAD's, what we
14 call, publication and disclosure provisions also limit what the
10:18:23 15 Mission may say in its job advertising.

16 So taking those sort of one step at a time in the
17 likelihood of success, let's start first with the co-religionist
18 exemption. And let me step back for a moment and just talk
19 about history. For literally decades, the idea that religious
10:18:42 20 institutions can hire co-religionists has been well engrained in
21 not just the law but also sort of commonsensically. You can go
22 back 150 years to the *Watson v. Jones* case, the US Supreme
23 Court, and see language in that, embedded in that case; you can
24 jump ahead to the '50s and look at the *Kedroff* case as well that
10:19:02 25 talks about the importance of religious autonomy.

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1 And the way I like, I think, best to explain this, Your
2 Honor, is if you think about religious autonomy as like an
3 umbrella, so you have at the top of the umbrella religious
4 autonomy, and then as offshoots from that, underneath the
10:19:20 5 doctrine of religious autonomy, on one side you have the
6 ministerial exception, and in that -- in that -- in that space,
7 in that bucket, the ministerial exception applies to a narrow
8 collection of employees, but it has very broad protection.

9 On the other side underneath that umbrella you have the
10:19:40 10 co-religious exemption. Unlike the ministerial exception, the
11 co-religionist exemption applies to a broad collection of
12 employees, and in our instance, we believe every single employee
13 at the Yakima Mission, but it has more narrow application. The
14 protection itself means that there is a shielding of employment
10:20:02 15 decisions that are rooted in religious practice, observance, or
16 belief.

17 I would just say at the outset, because I know it's
18 going to be brought up, I'll just deal with it on the front end,
19 we're not saying that if someone files a complaint that the
10:20:19 20 Commission or that the Attorney General can't inquire about that
21 particular allegation. What we are saying, though, is that in
22 response to that, if the complaint relates or is tied to an
23 employment decision that is based upon a religious practice,
24 observance, or belief, at that point, that's when the inquiry
10:20:44 25 stops.

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1 So, again, going back to the case law and what this --
2 what this looks like, the co-religionist doctrine or exemption
3 and the constitutionality, how it's embedded in the Constitution
4 is -- is not foreign to other courts, certainly other circuit
10:21:08 5 courts. In fact, if you look, there's at least six different
6 courts of appeals, albeit looking at it in the confines of
7 Title VII, but have made very clear that a narrow reading of
8 Title VII's religious exemption would necessarily raise federal
9 constitutional issues. So I'll explain that here a little bit
10:21:31 10 more concretely.

11 If you look at the *Hall* case out of the Sixth, the
12 *Little* case out of the Third, *Mississippi College* out of the
13 Fifth, the *Killinger* decision out of the Eleventh, what these
14 cases hold is that you have embedded in the context of Title
10:21:49 15 VII, you have a religious exemption, and what the courts are
16 saying is, look, thank goodness there's a religious exemption
17 that exists there in Title VII, because if you take that
18 exemption away, all of a sudden you've got federal
19 constitutional problems.

10:22:06 20 And for decades, decades this has not been an issue. In
21 fact, if you look across the United States, all of these states
22 have a corollary to Title VII in their state statutes. The
23 problem that exists, and Washington is an anomaly, is that now
24 that corollary, that religious exemption that would cover
10:22:26 25 non-ministerial employees is now absent. It is completely gone.

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1 And because it's gone, we now have a federal constitutional
2 issue. And those cases from those circuits underscore that
3 exact point.

4 And if Your Honor is concerned about, well, okay, what
10:22:43 5 about the Ninth Circuit? Well, I think the Ninth Circuit has
6 given us a preview of what they would hold in this instance. If
7 you look at the *EEOC v. Townley Engineering* case -- granted it
8 wasn't the main point of it, but the Ninth Circuit said it --
9 they said even without -- and they're referring to Title VII's
10:23:03 10 religious exemption -- it says: The First Amendment would limit
11 Title VII's ability to regulate the employment relationships
12 within churches and similar organizations.

13 The *World Vision* case, if you look at the concurring
14 opinions in that case, *Spencer v. World Vision*, Judge Kleinfeld
10:23:20 15 actually gave a really, I think, eye-opening quote there that
16 sort of underscores again why we're here today. He said: If
17 the government coerced staffing of religious institutions by
18 persons who rejected or even were hostile to the religions of
19 the institutions they were intended to advance, then the shield
10:23:40 20 against discrimination would destroy the freedom of Americans to
21 practice their religion.

22 So I think the Ninth Circuit has already told us what it
23 thinks about co-religionist exemption and whether or not it's
24 actually embedded in the US Constitution. In addition to that,
10:23:55 25 even other circuits outside the Title VII context, *Bryce*, the

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1 Bryce decision we actually cite out of the Tenth Circuit. That
2 case involved an employee who was in a same-sex relationship,
3 and it was a dispute about -- about discipline. And the Court
4 said that ecclesiastical -- it was an ecclesiastical one about
10:24:18 5 discipline, faith, internal organization, or ecclesiastical
6 rule, customer law, and was not a purely secular dispute.

7 We also cite, just more recently there was a case out of
8 the Southern District of New York that also said this exact same
9 thing.

10:24:34 10 So I think it's fairly apparent that this is embedded in
11 not just case law but obviously the federal Constitution
12 requires it. The unfortunate thing here -- and we litigate
13 across the United States -- Washington is an anomaly. It's out
14 on an island. I mean, if we step back from the legalese for a
10:24:58 15 moment and just think about the prospect that somehow a
16 religious organization could be forced to hire some activist
17 that has a differing view on biblical sexuality, that's how
18 *Woods* came about. But it's nonsensical to think that somehow
19 we've reached a world where a religious organization can't hire
10:25:17 20 a co-religionist. I get lost in these sometimes. When I step
21 back from it, I just think there's no way that that can be. And
22 I think --

23 THE COURT: But, Mr. Tucker, how do I square the
24 argument that you are making with the Supreme Court's decisions
10:25:30 25 in *Hosanna-Tabor* and *Our Lady of Guadalupe Schools* where this --

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1 when -- you know, analyzing the issue and rights of religious
2 entities to choose, you know, their management and their
3 ministers without interference from the government, and
4 balancing that with the right of individuals not to be
10:25:52 5 discriminated against? The Supreme Court is the one who has
6 established this, you know, ministerial exception for where
7 there can be government regulation and interference.

8 How do I square the argument that you are making with
9 the Supreme Court -- at least what I view the Supreme Court's
10:26:07 10 most recent pronouncements about the way that those issues
11 intersect?

12 MR. TUCKER: Well, the -- we applaud both -- we have
13 applauded both of those decisions, and they do -- they do mix
14 well together. Again, the ministerial exception you put in one
10:26:21 15 bucket, so you have individuals that, if you're deemed a
16 minister, then you have broad protections of -- if a
17 discrimination complaint is alleged. The problem is you're
18 going to have positions like an IT professional, like an
19 administrative assistant, who aren't necessarily meeting -- if
10:26:40 20 you look at the factors, for example, in *Hosanna-Tabor* and then
21 further expounded upon in *Our Lady of Guadalupe*, there are
22 individuals that fall outside those lines, where they're not
23 really there to necessarily minister to others. These are -- in
24 the co-religionist space, you're looking at internally, these
10:27:01 25 are almost inward-facing employees that don't necessarily have

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1 the job description, they don't have the requirement necessarily
2 of -- of teaching, espousing the faith, being required to take
3 certain doctrinal courses that the Supreme Court viewed in
4 *Hosanna-Tabor* and also in *Our Lady of Guadalupe*.

10:27:25 5 The Supreme Court, you know, admittedly hasn't taken a
6 case to recognize yet that the co-religionist exemption is,
7 indeed, embedded in the First Amendment. The -- these other
8 circuit courts, I think, have -- have spelled out what that
9 answer is. But the reason the Court has not had the opportunity
10:27:45 10 is because for decades this has been a nonissue. It didn't
11 become an issue until last year when Attorney General Ferguson
12 came out and said, "Guess what? The WLAD doesn't apply to
13 non-ministerial positions."

14 States across the union have exemptions already
10:28:03 15 embedded, so this constitutional issue never arises because it's
16 not a concern. And, again, if you go look at *Hall*, if you look
17 at *Little*, those cases are saying, "Thank goodness we've got
18 this exemption, because otherwise we'd have to deal with this
19 constitutional issue." It's a backstop --

10:28:18 20 THE COURT: But why would the Supreme Court set up this
21 distinction if, in fact, every position would be considered, you
22 know, co-religionist, whatever it may be? Why would this
23 distinction be necessary, that the Supreme Court has set up, if
24 your theory is the law?

10:28:36 25 MR. TUCKER: Well, I think -- I think the Court has --

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1 has historically been very incremental and only wants to deal
2 with the facts in those particular instances. I think -- I
3 think in -- in those instances, both in *Hosanna-Tabor*, as well
4 as in *Our Lady of Guadalupe*, we were focused on the -- the fact
10:29:05 5 that they were teachers, they're only looking at the -- those
6 that were before them. And here, we're talking outside the
7 confines of teachers themselves. And the -- the Court, I would
8 have liked them to have taken the *Woods* decision. They did not.
9 And so -- as Justice Alito, though, highlighted in that cert
10:29:32 10 denial, he made very clear there's going to come a day where we
11 have to deal with this, and we believe that this -- that this is
12 apparent, certainly, in this particular instance.

13 Beyond even the co-religionist argument, Your Honor,
14 there's still three other reasons why Your Honor could grant
10:29:50 15 preliminary injunctive relief here. On the free exercise front,
16 again, very briefly, the WLAD is not neutral and generally
17 applicable. The purpose -- the stated purpose of the WLAD is to
18 eliminate and prevent discrimination.

19 The problem is when you look at it, it has an exemption
10:30:10 20 for small employers, so if you're under eight employees, you
21 can -- you can discriminate, really, with no -- with no question
22 or no issue. And when you start building in treating religious
23 organizations differently, if you go and look at the *Fulton*
24 case, *Fulton v. City of Philadelphia*, it's a very important case
10:30:34 25 relative to general applicability and its -- and how it relates

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1 to this particular case.

2 In addition to that, you've got individualized
3 exemptions. You've got the Commission, in essence, being able
4 to -- in certain instances, they're authorized under the
10:30:54 5 statute -- you look at 49.60.180, Subsection 3, it says that the
6 Commission is authorized, quote, by regulation or ruling in a
7 particular instance, end quote, to permit any employment
8 practice if the Commission finds the practice to be appropriate
9 for the practical realization of a quality of opportunity
10:31:15 10 between the sexes. So now you've got the Commission being able
11 to say, "Well, yeah, I think this is going to provide equality
12 or opportunity for the sexes, so we're going to go ahead and
13 give a pass on this."

14 Whenever you have the ability of a Commission like that
10:31:28 15 to give a pass to make these individualized exemptions, then
16 that too, also is a free exercise violation, when you look at
17 the *Fulton* case.

18 THE COURT: I thought the responsive brief indicated
19 that that exemption was no longer -- because of subsequent
10:31:44 20 either legislative action or court decisions was -- can no
21 longer be used.

22 Did I misunderstand the brief, Mr. Tucker?

23 MR. TUCKER: Well, even if you -- I think, Your Honor,
24 even if it's not used at all, if you go back and look at *Fulton*,
10:31:58 25 the *Fulton* decision from the Supreme Court actually is the

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1 response to that. It doesn't matter whether or not it's
2 actually -- if it's on the books and it's not being used, it's
3 neither here nor there. It's a --

4 THE COURT: I think that's actually not true. The
10:32:09 5 question is whether if it's -- if there's a deliberate choice
6 for it to not be used or if there is subsequent legal authority
7 that says it can't be used. I think there is a distinction
8 between those issues, because it goes to the issue of
9 discretion, and if the discretion no longer exists because the
10:32:25 10 statute has been, you know, deemed unconstitutional, even though
11 it may still be on the books, I think there's an issue there,
12 and that's what I'm trying to get to the issue of, is what is
13 your understanding of the status of that statute? Is it a
14 discretion they are not using it, or is there a legal barrier to
10:32:41 15 them using it?

16 MR. TUCKER: My understanding, Your Honor, was that it
17 was discretionary, but, you know, it's not -- it's not a point
18 that is, again, needed even for preliminary injunctive relief
19 here because even the one I referenced before, the fact that
10:32:56 20 religious organizations are being treated less than employers
21 that have seven or less employees in and of itself makes this
22 not generally applicable. And so even on that basis alone,
23 again, I would say we could win on free exercise.

24 Beyond that, and I mentioned this sort of at the outset
10:33:18 25 as I was providing a roadmap, one area that I think has gained

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1 importance even since the filing of this lawsuit is the
2 expressive association claim that we have. There, when you look
3 at what's required under expressive association, you have -- you
4 know, a couple different elements need to be met there. One is
10:33:39 5 whether or not the group engages in expressive association.
6 Here, if you look at Exhibit 1 to our complaint, we say very
7 clearly that the Mission's purpose is to spread the gospel of
8 the Lord Jesus Christ, so we certainly have an express purpose,
9 and we engage in expressive association by spreading the gospel
10:34:00 10 of Jesus Christ.

11 The second one, element there is whether the forced
12 inclusion of a person significantly affects the group's ability
13 to express its message. And here the courts have provided that
14 you must give deference to the organization in deciding what
10:34:19 15 would or would not impair the message of the organization.

16 I'll just jump to the main point here. If you look at
17 the *Slattery* case, again out of the Second, there it was a
18 pro-life center that challenged a state employment statute, a
19 nondiscrimination law that prevented discrimination based on
10:34:40 20 reproductive health decisionmaking, whether or not they obtained
21 an abortion or had an abortion. There the Second Circuit held
22 that the center had the right to determine whether or not its
23 employees will effectively convey its message.

24 Now, the response that you're going to hear momentarily
10:34:55 25 is, "Well, wait a second. Timeout. You know, the -- you know,

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1 this right of expressive association doesn't apply in the
2 employment context." Again, that is what happened in the Second
3 Circuit case. It's not just the Second Circuit that has found
4 this. The Fifth Circuit has found this as well in *Bear Creek*.
10:35:13 5 And, Your Honor, I think if you're interested, although I don't
6 think the Ninth Circuit squarely addressed it, if you look most
7 recently, just this last year, in the concurring opinion in the
8 *Green v. Miss United States of America* case, the concurrence
9 there again makes very clear -- again, it's a concurring
10:35:33 10 opinion, not the -- not the majority but the concurring opinion
11 there makes clear that this right is found in the employment
12 context itself.

13 And so, again, I think the expressive association claim
14 is -- is not just third on the list, it's actually a very
10:35:52 15 important point and one on which the Court can rely.

16 The fourth is speech. In the speech context, as we've
17 talked about before, the Mission has -- has chilled its speech
18 based on what we define as the publication ban in our papers and
19 then also the disclosure provision. And we feel that,
10:36:15 20 obviously, the inability not just to post, but also the
21 inability to actually have a conversation with, to require
22 disclosure of certain information is, indeed, a restriction on
23 speech.

24 The State says, "Well, no, no, no. That doesn't
10:36:33 25 really -- there's really no restriction of speech here." I

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1 think I would point Your Honor back to the -- another Ninth
2 Circuit decision from this very year, from 2023. It's *Yim v.*
3 *the City of Seattle*, 63 F.4th 783, where the Court held, I think
4 very similarly or analogously here, that -- it involved some
10:36:59 5 landlord/tenant issues, but it basically said that a law that
6 prohibited, quote, requiring disclosure or inquiring about
7 prospective tenants' criminal records infringed upon the
8 landlord's speech. So our inability to inquire about their
9 positions on issues of biblical sexuality, again, that is a
10:37:21 10 speech concern.

11 Then very briefly, Your Honor, so I can wrap up the main
12 portion of this, the other preliminary injunction factors, like
13 irreparable harm, we've talked about the harm previously; the
14 Mission's rights, again, are chilled. That alone -- you know, I
10:37:40 15 don't want to go back and relitigate -- or rediscuss the
16 standing elements, but certainly chill itself alone, *SBA List* to
17 me -- *SBA List* and *Tingly* really solidify that, but they also
18 help us in this instance as well, making very clear what injury
19 is.

10:38:00 20 The State's response to this is, "Well, you know, some
21 of these harms, they may be modest in kind."

22 I'm not aware, Your Honor, that there's a distinction
23 between modest or extreme harm, in the context of preliminary
24 injunctions, and so rather than put that on some sort of sliding
10:38:20 25 scale, I don't think that's necessary. The reality is that we

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1 have been harmed.

2 And then as it relates to the balance of -- of equities
3 of the public interest piece, again, here there's no -- there's
4 no burden on the government for not being able to
10:38:36 5 unconstitutionally enforce a law, and certainly the Attorney
6 General and the Commission remain free to enforce the WLAD
7 against others.

8 I think it's very important to note -- I don't know if
9 I've mentioned this previously -- that this is an as-applied
10:38:54 10 request. You know, we're not asking for the world. We're
11 asking as it relates to the Union Gospel Mission of Yakima.

12 And if -- if there's no further questions, Your Honor,
13 that concludes at least my opening on the motion for preliminary
14 injunction.

10:39:11 15 THE COURT: Thank you Mr. Tucker.

16 Mr. Ward, are you making the argument on behalf of
17 defendants on this matter as well?

18 MR. WARD: Yes, Your Honor.

19 THE COURT: All right.

10:39:21 20 MR. WARD: Thank you.

21 I'd like to begin by just noting what is an obvious
22 point: That the Court need not, and, indeed, cannot, consider
23 the preliminary injunction motion if it finds that UGM lacks
24 standing to bring this case. So the standing issue is the
10:39:40 25 threshold issue, obviously, here. But even if we were to get

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1 past that and to look to plaintiff's motion for a preliminary
2 injunction, it must be denied. UGM has failed to make a showing
3 that it is likely to succeed on the merits of its claim and that
4 it is entitled to the extraordinary remedy of a preliminary
5 injunction.

10:40:03

6 It has not shown any of the other factors that are
7 required for a preliminary injunction, including irreparable
8 injury, balance of hardships, or public interest. Primarily it
9 just argues on those factors that if it makes a strong showing
10 of likelihood of success on the merits of its claims, it will
11 automatically satisfy the other factors for an injunction.

10:40:18

12 But here there's simply very thin bases as a matter of
13 law and as a matter of precedent, particularly in the Ninth
14 Circuit, for the merits of plaintiff's claims.

10:40:42

15 I'd like to begin with something that I think is -- was
16 raised by my opposing counsel in his argument and is in,
17 obviously, the briefs of the parties, too. As I understand it,
18 the position of UGM is that somebody could bring a
19 discrimination claim to the Human Rights Commission or to the
20 Attorney General's office, but any inquiry into the alleged
21 discrimination would have to stop as soon as a religious belief
22 is asserted as a basis for the discrimination. And that
23 position is underscored in UGM's briefing as well.

10:41:05

24 This is a theory that has not been accepted by any
25 court. And it's quite a sweeping theory. Under this theory,

10:41:25

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1 religious employers would have to be exempt from any claim for
2 discrimination in employment, regardless of the employee's job
3 position or duties, whenever the employer asserts a religious
4 belief to justify the discrimination.

10:41:41 5 And I think Your Honor's questioning about the, you
6 know, development of the ministerial exception is on point here,
7 because certainly the US Supreme Court has never gone as far as
8 this has been suggested and has not adopted this as a rule.
9 Indeed, as my opposing counsel concedes, there's no Supreme
10:41:58 10 Court precedent on this issue, there's no Ninth Circuit
11 precedent either, that recognizes the sweeping co-religionist
12 exemption that plaintiffs are putting forward here.

13 Now, there is -- there is an exemption in Title VII that
14 is sometimes called Section 702, that provides an exemption
10:42:22 15 under Title VII for employers to -- to prefer to hire people who
16 share their religious -- religious affiliation. This has been
17 on the books for quite some time, but it has not prevented
18 courts from around the country, including the Ninth Circuit,
19 from saying that just because an employer has a religious basis
10:42:43 20 for discriminating against somebody based on sex or race or
21 national origin, Title -- you know, Section 702 of Title VII
22 does not give them a free pass for that discrimination, that
23 courts still can hear sex discrimination cases, for instance,
24 even if they are motivated by the religious belief of an
10:43:04 25 employer.

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1 And in our briefing, we cited a couple of cases from the
2 1980s from the Ninth Circuit, *Pacific Press* and *Fremont*
3 *Christian School* case, and there are literally dozens of cases
4 from around the country that also have found, again, that it is
10:43:21 5 possible, even if an employer has religious beliefs that are
6 discriminatory based on sex or other protected characteristics
7 under Title VII, that a party can still move forward with a
8 discrimination claim, notwithstanding the religious motivation
9 behind the discrimination.

10:43:40 10 So again, I don't think there's been even remotely close
11 to a showing of likelihood of success on a co-religionist theory
12 that, really, has not been adopted anywhere, and much less in
13 the Ninth Circuit.

14 Similar arguments can go towards the argument that the
10:44:00 15 WLAD is not a neutral law of general applicability. As I
16 understand it, UGM's argument on this point is that the WLAD is
17 not a neutral law of general applicability because it exempts
18 small employers, people who employ less than eight people.

19 But Title VII, as I would point out, also exempts small
10:44:23 20 employers, people who employ less than 15 employees, and there's
21 been no question under federal law that that -- there's been no
22 holdings under federal law that that kind of small employer
23 exemption, as long as it's neutrally applied, does not violate,
24 you know, the rule that -- against having a neutral law of
10:44:42 25 general applicability. Under both --

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1 THE COURT: But given the way that -- given the way that
2 the Supreme Court has been looking at issues related to
3 neutrally applicable, so *Tandon*, *Kennedy*, when you're allowing
4 secular behavior to happen in a way that -- and not with respect
10:45:01 5 to religious-related behavior, what is your view on the way that
6 will be applied and interpreted to a provision such as this?

7 MR. WARD: Religion is treated the same way: small
8 religious employers are exempt; large religious employers are
9 not exempt. And that's the same for private -- for secular
10:45:23 10 businesses: smaller ones -- smaller secular employers are
11 exempt; larger secular employers are not. Religion -- it's
12 neutral towards religion. It does not distinguish or
13 discriminate in any way based on religion, so it's a neutral law
14 in that regard.

10:45:41 15 And *Tandon*, I believe, is even a case that we cited in
16 our briefing for support for this proposition that this
17 exemption is neutrally applied, so I believe it actually
18 supports, you know, our position on this.

19 And as Your Honor recognized during my opposing
10:46:02 20 counsel's presentation, we did, in our briefing, note that a
21 provision in the Washington Law Against Discrimination that was
22 adopted in 1971 that gave discretion to the Commission to adopt
23 rules and regulations meant to ensure practical equal -- or
24 practically equality of the sexes, that was adopted in 1971, but
10:46:31 25 the following year, 1972, the Washington voters approved the

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1 Equal Rights Amendment. And in 1978, the Washington Supreme
2 Court held that the Equal Rights Amendment adopted in 1972 swept
3 away any statutes that permit special treatment of one sex,
4 because of the ERA.

10:46:49 5 So the statute is not -- that exception is not operable.
6 It hasn't been for -- nearly since it was adopted, and it is not
7 something that serves as a basis to show that the WLAD is not a
8 neutral law of general applicability.

9 THE COURT: Well, and that's the question I was asking,
10:47:07 10 is it --

11 MR. WARD: Yeah.

12 THE COURT: -- a situation where discretion is granted,
13 it's just not used; or has it subsequently been determined
14 legally it can't be used? Because I think that's a different
10:47:17 15 issue when you're discussing the First Amendment-related issues
16 of whether there's discretion and neutral applicability. So
17 thank you for the clarification.

18 MR. WARD: Yes, Your Honor.

19 Now, turning to arguments regarding the First Amendment
10:47:34 20 right to expressive association as a basis for UGM's claims,
21 again, the theory that they're advancing here is not one that
22 has been adopted by the Ninth Circuit; it's not one that has
23 been adopted by the United States Supreme Court. There is just
24 very little precedent for holding that the right to expressive
10:47:58 25 association applies in the context of employment.

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1 It has not been, you know, held in, for instance, the
2 *Dale* case that is relied upon substantially by -- by plaintiff.
3 The *Dale* case did not concern employment. It was about
4 membership in the Boy Scouts of America as a private
10:48:19 5 organization, and it was a claim that had been brought under New
6 Jersey's public accommodations law, not their employment
7 discrimination laws. So *Dale* does not provide support. And
8 there have been other cases from around the country that we
9 cited in our brief, such as the *Billard* case out of North
10:48:35 10 Carolina, that recognize that *Dale* does not sweep so far.

11 There's also cases from the Supreme Court, such as
12 *Hishon v. King & Spaulding* from the 1980s, where an employer
13 attempted to assert that its rights of expressive association
14 applied in its context of denial of partnerships to women, and
10:48:53 15 that was not a successful argument in the US Supreme Court.

16 The *Slattery* decision is recent, it's from the Second
17 Circuit, it is not binding on this Court, and it's not one that
18 is consistent with case law in the Ninth Circuit or it's not one
19 that is -- you know, that I think the Court should look to
10:49:15 20 because it is not controlling on this Court, and it's not one
21 that is supported by other cases.

22 Finally, in issues related to First Amendment rights to
23 free speech, plaintiffs here are asserting that defendants have
24 chilled them from posting job advertisements for their positions
10:49:44 25 that they wish to hire for. As we noted in our briefing, the

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1 job posting that they -- you know, the religious hiring
2 statement that they wish to publish, however, does not actually
3 say that they will refuse to hire anyone based on a protected
4 category under the WLAD. But in any case, there are
10:50:08 5 advertisements for positions that they are seeking to publish,
6 they are commercial speech, and they are entitled to less First
7 Amendment protection. And there's case law cited by defendants
8 here that if you are hired -- if you are making a job posting
9 that violates the law -- that you know, seeks to hire -- you
10:50:33 10 know, discriminate in hiring, that is not speech that is
11 protected. So, to a large extent, plaintiff's free speech
12 arguments here would depend on their likelihood of success on
13 the merits of their other claims.

14 Finally, just to mention -- plaintiff raises a claim
10:50:54 15 under -- that they call the disclosure requirement, I believe,
16 under the WLAD, which is, I think, RCW 29 -- or 49.60.208, I
17 believe is the section. This is a provision of the WLAD that
18 prohibits employers from requiring employees to disclose their
19 religious beliefs or religious affiliation. On its face, it
10:51:20 20 does not require employees -- or employers to restrict their
21 speech. It just protects the right of employees not to
22 disclose. And that way it distinguishes it from the *Yim v. City*
23 *of Seattle* case cited by plaintiff, where there was an ordinance
24 by the City of Seattle that prohibited not only requiring
10:51:42 25 disclosure but also inquiring about criminal histories. So

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1 that's a distinction, and it's also just one that, this is a law
2 that there is no indication that it's ever been applied, as far
3 as we can tell in -- against anyone.

4 I think that will conclude my argument. I know that we
10:52:09 5 are getting close to two hours, and I appreciate the Court's
6 patience, and I will stop there for now.

7 Thank you.

8 THE COURT: All right. Thank you.

9 Mr. Tucker.

10:52:22 10 MR. TUCKER: Your Honor, just very briefly, a couple
11 points. I want to go back just to the -- Your Honor's comment
12 earlier about sort of weighing what to do about *Hosanna-Tabor*,
13 *Our Lady of Guadalupe*, and then to just sort of maybe -- maybe
14 add a little bit more color to the ministerial exception and
10:52:41 15 co-religionist exemption sort of distinction.

16 I think it's important to note that the ministerial
17 exception is broader in that courts do not question the reason
18 for hiring or firing decision if the position is ministerial.
19 The Court simply stays out of it, in that instance, once that
10:52:57 20 determination is made.

21 On the other hand, with the co-religionist exemption,
22 that applies, of course, to non-ministerial employees. Courts
23 can, and sometimes do, involve themselves in these disputes, but
24 when the employer or applicant for that non-ministerial position
10:53:16 25 does not share the employee's or employer's religious beliefs,

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1 then the First Amendment steps in to protect the religious
2 employer in that instance. So I just wanted to draw that
3 distinction.

4 Working backwards, some of the comments that defendants'
10:53:34 5 counsel made, going back to the expressive association, there
6 was a reference to -- to the Supreme Court's decision in the
7 *King & Spaulding* case, that was certainly pre-*Dale*, which --
8 which is, obviously, a similar decision in this -- in this
9 arena, but I think it's important to recognize there that if you
10:53:52 10 go back and look at the *King & Spaulding* case, the Court didn't
11 say that the right is inapplicable but only said that the law
12 firm there had failed to show how its expression would, in fact,
13 be altered. So it really failed, if you will, both *Dale*
14 factors, even though it was pre-*Dale*, you don't have a group
10:54:09 15 engaging in, you know, that expressive association or -- or a
16 showing that somehow forced inclusion of a person would
17 significantly affect the group's ability to express its message.
18 So I think that's readily distinguishable.

19 And, again, I do think -- I understand that the -- that
10:54:26 20 the *Slattery* decision is in the Second Circuit, but it is very
21 much -- the analysis is very much on point here, and I do think
22 that, as I mentioned, the Fifth Circuit has tackled this in the
23 *Bear Creek* decision. And, again, I would point Your Honor, if
24 you want to -- if -- something closer to home in the Ninth
10:54:51 25 Circuit, the concurring decision in *Green v. Miss United States*,

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1 that's the 52 F.4th, pinpoint cite, 804 to 805, is where Judge
2 VanDyke really discusses that particular element.

3 Also, Your Honor, you know, you referenced -- in
4 relation to the neutral and generally applicable discussion, I
10:55:18 5 think you were right on target, Your Honor, when you mentioned
6 *Tandon*. You know, and we have a disagreement, obviously, with
7 opposing counsel on what *Tandon* means, but we know that during
8 the line of COVID cases that came out, one thing that eventually
9 became abundantly clear, with *Tandon* at least, was that you
10:55:37 10 can't treat religious organizations lower, as second class. And
11 so here, I think, you know religion -- religious organizations
12 are put on a -- on a different plateau, and when you have
13 organizations that, by the mere fact they've got seven or eight
14 individuals, are able to indiscriminately discriminate, I think
10:56:03 15 that underscores the free exercise concern there as well.

16 I think that's all I have, Your Honor, in rebuttal to
17 Mr. Ward's comments.

18 THE COURT: All right. Like last time, I'll offer you
19 each one more opportunity.

10:56:19 20 Mr. Ward, anything else you'd like to say at this time?

21 MR. WARD: Your Honor, it may be exhaustion, but I'm
22 going to say "no."

23 THE COURT: All right. Okay. That will conclude the
24 arguments today. Counsel, I am not going to be ruling today. I
10:56:35 25 will issue an order, obviously, first on the motion to dismiss.

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1 Depending upon the results of that, then we'll take up the issue
2 of the preliminary injunction.

3 Given some other pending matters I have, it's my
4 expectation to have an order on the motion to dismiss within 30
10:56:51 5 days, and then I will move to the preliminary injunction after
6 that, so -- if that issue is still pending before the Court, so
7 just in terms of managing your expectations of when you may hear
8 from me. So that's my plan moving forward.

9 Any questions? Mr. Tucker?

10:57:11 10 MR. TUCKER: No, Your Honor. I would -- I would just --
11 I appreciate that -- the timing there. I would just underscore
12 the fact that on the preliminary injunction side, we are
13 attempting to hire those two non-ministerial positions within
14 the fiscal year, if at all possible, but understand the Court's
10:57:29 15 restrictions on its large caseload as well.

16 THE COURT: And your fiscal year starts in September?

17 MR. TUCKER: It actually ends June 30th, begins July 1.
18 So that's the -- that's the immediate concern that we have.

19 THE COURT: All right. Thank you.

10:57:44 20 Mr. Ward?

21 MR. WARD: Nothing further, Your Honor.

22 THE COURT: All right. I will do my best to move up
23 that timetable, but as I am certain you are aware, we are down a
24 judge here in Eastern Washington, and so that has made the
10:58:00 25 schedule a bit on the hectic side, and so I did move you all up,

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1 given this is a preliminary injunction, in terms of prioritizing
2 you over other cases. I will try to continue to do that, but
3 I'm just trying to manage your expectations moving forward.

4 All right. I very much -- very much appreciate the
10:58:20 5 helpful and insightful arguments today. Thank you for making
6 yourselves all available. I found this very, very helpful. So
7 thank you all, and that concludes this matter.

8 Court's in recess.

9 MR. TUCKER: Thank you, Your Honor.

10:58:37 10 MR. WARD: Thank you, Your Honor.

11 (Hearing concluded at 10:58 a.m.)
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C E R T I F I C A T E

I, KIMBERLY J. ALLEN, do hereby certify:

That I am an Official Court Reporter for the United States District Court for the Eastern District of Washington in Richland, Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on the first page hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 28th day of September, 2023.



Kimberly J. Allen, CRR, RMR, RPR, CCR(WA)
Washington CCR No. 2758
Official Court Reporter
Richland, Washington